IN THE SUPREME COURT OF THE UNITED STATES

October Term 1973

Misc. Number: 73-5772

ANTHONY PASQUALL FARETTA,

Petitioner,

versus

THE STATE OF CALIFORNIA,

Respondent.

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SUPREME COURT, U.S.

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MOTION FOR LEAVE TO FILE AND PROSECUTE ACTION WITHOUT THE PREPAYMENT OF FEES IN THIS COURT PURSUANT TO 28 U.S.C.A. 1915 (a)(d) and a PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE SECOND APPELLATE DISTRICT OF THE STATE OF CALIFORNIA (After a Denial of a Hearing by the Supreme Court of the State of California)

OOOoOOO

ANTHONY PASQUALL FARETTA, Petitioner
Central Training Facility
Post Office Box 686 - Central
Soledad, California, 93960

Petitioner appearing herein

Pro Se

SUPREME COURT OF THE UNITED STATES
October Term 1973

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Misc. Number: _____

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ANTHONY PASQUALL FARETTA,

Petitioner,

versus

THE STATE OF CALIFORNIA,

Respondent.

----------X

MOTION FOR LEAVE TO FILE AND PROSECUTE A PETITION FOR A WRIT OF CERTIORARI WITHOUT THE PREPAYMENT OF FILING FEES, COSTS OF PROSECUTION, OR COSTS OF PREPARATION OF THE RECORD BY PRINTING IN FORMA PAUPERIS AS ALLOWED BY SECTION 1915 TITLE 28 OF THE UNITED STATES CODE AS ANNOTATED

TO: THE HONORABLE WARREN E. BURGER, Chief Justice and the Associate Justices of the Supreme Court of the United States of America:

ANTHONY PASQUALL FARETTA, the petitioner in a proposed petition for a writ of certiorari, which is attached hereto and incorporated as a portion hereof, respectfully asks that this Court enter its order allowing the said petition to be filed in this Court without the prepayment of filing fees, or the conditioning of prepayment for the costs of prosecution and/or of printing the record for filing in this Court; in forma pauperis as is allowed by the statutory authority of 28 U.S.C. 1915 (a) (d).

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The proposed action is a petition seeking a discretionary review in this Court of a decision as entered by the District Court of Appeal of the Second Appellate District of the State of California, after a petition for a hearing by the California Supreme C ourt was denied. The petition presents two issues of serious constitutional importance which appear, due to the variance of decisions relating thereto by the Courts of the Various States and of the United States appear to require appropriate determination by this Court. The issues presented by the petition specifically turn on the constitutional right of a defendant to represent himself pro se or in propria persona pursuant to the mandatory provisions of the sixth amendment of the C onstitution of the United States and if there was a deprival of due process of law when the defendant was not allowed to produce witnesses in his defense which disallowance depriving the petitioner of the fair trial that is contemplated by the due process and equal protection clauses of the fourteenth and the fifth amendments of the C onstitution of the United States.

Attached hereto and incorporated as a portion hereof the moving papers is the affidavit of this petitioner which indicates his inability to prepay the costs of filing of this action, prepay the costs of prosecution, or defray the costs of printing the record, and further that he does not have security which could be given in lieu of the said prepayment to condition the said filing herein.

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Further the affidavit indicates that the Petitioner is a peuper and a poor person.

Wherefore upon good cause being shown, it is respectfully submitted THAT there is sufficient basis for this court to enter its order allowing the commencement of this proposed petition in forma papueris. Upon that basis it is respectfully requested that such an order enter forthwith and that the Clerk be directed to file the petition as attached hereto and incorporated as a portion hereof, instanter without the prepayment of the said fees and costs as required under the rules of this Court.

DATED: October 15th, 1973 at the Central Training Facility of the California Department of Corrections, Soledad, California, 93960.

Respectfully submitted,

Anthony Pasquale Faretta

ANTHONY FARETTA, Petitioner
Appearing in Propria Persona & Pro Se

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DECLARATION AND AFFIDAVIT OF THE PETITIONER ANTHONY FARETTA IN SUPPORT OF THE MOTION TO COMMENCE THE ACTION AND PETITION FOR A WRIT OF CERTIORARI IN FORMA PAUPERIS, 28 U.S.C. 1915 (a) (d); WITHOUT PREPAYMENT OF FEES

STATE OF CALIFORNIA)
) ss.:
COUNTY OF MONTEREY)

I, the undersigned do hereinafter declare under the penalities of perjury as follows; but not limited thereto; in support of the motion for Leave to File and Commence a Petition for a Writ of Certiorari to the District Court of Appeal of the Second Appellate District of the State of California after denial of a hearing by the California Supreme court:

1. Declarant is the pro se petitioner in a petition for a writ of certiorari which is sought to be brought to this court from an adverse decision as entered by the District Court of Appeal of the Second Appellate District of the State of California, after a petition for a hearing was denied in the California Supreme C ourt;

2. Declarant brings this action in good faith, and on information and belief states that the issues as presented are important constitutional questions as well as questions which deal with the proper administration of criminal justicewithin the United States;

3. Your declarant brings this action within the properly established time limits for the taking of such an action in this Court;

4. Your declarant states that the nature of the

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proposed action is to specifically request that this court resolve the variances which appear in the various courts of the States and the United States with respect to the Sixth Amendment right of representation in propria persona in a criminal trial; and further the right to have a fair trial wherein the right to have witnesses appear in behalf of the defendant is not unpermissively curtailed in violation of the fifth and fourteenth amendment of the United States Constitutions proscriptions against denial of due process and equal protection under law;

5. Declarant is a poor person without funds, property and or other collateral with which the filing fees and the costs of prosecution of the proposed action could be given in lieu thereof said prepayment; further declarant has not transferred any property within the past year; declarant has not any intangible assets of any nature; and declarant is a pauper;

6. Further this declarant sayeth not.

Dated: October 15th, 1973 at the Central Training Facility, Soledad, California, 93960.

Anthony P. Faretta

ANTHONY PASQUALL FARETTA, Declarant

I, affirm under the penalities of perjury that I have read the contents of the foregoing declaration and know the contents thereof, and that the information as contained therein is true and correct to the best of my knowledge and belief as to those matters given on information and belief I state that I believe them to be true. Executed at the place as first written on October 15th, 1973.

ANTHONY PASQUALL FARETTA, Declarant

Anthony P. Faretta

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IN THE SUPREME COURT OF THE UNITED STATES

October Term 1973

ANTHONY PASQUALL FARETTA,

Petitioner,

versus

THE STATE OF CALIFORNIA,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE SECOND APPELLATE DISTRICT OF CALIFORNIA (After a denial of a Hearing by the California Supreme Court)

ANTHONY PASQUALL FARETTA,
Petitioner
Central Training Facility
Post Office Box 686 - Central
Soledad, California, 93960

Petitioner appearing in

PROPRIA PERSONA AND PRO SE

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SUPREME COURT OF THE UNITED STATES
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ANTHONY PASQUALL FARETTA,

Petitioner,

versus

THE STATE OF CALIFORNIA,

Respondent.

----------X

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE SECOND APPELLATE DISTRICT OF THE STATE OF CALIFORNIA AFTER DENIAL OF A HEARING IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

TO: THE HONORABLE WARREN J. BURGER, Chief Justice and the Associate Justices of the Supreme Court of the United States of America:

Petitioner, ANTHONY PASQUALL FARETTA, respectfully prays that a writ of certiorari issue to review a judgment and decision as entered by the District Court of Appeal of the Second Appellate District of California and after a petition for a hearing to the California Supreme Court has been denied.

PRELIMINARY STATEMENT

Petitioner is confined at the California Department of Corrections Central Training Facility at Soledad,

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California pursuant to a judgment as entered by the Superior Court of the State of California for the County of Los Angeles after a trial to a jury on a violation of section 487 sub-division three of the California Penal Code; Grand Theft; with three prior felony convictions found to be true.

At the trial and the proceedings prior to the trial the petitioner had been granted the right to represent himself in propria persona and to appear pro se (CT-3); however the propria persona and pro se representation was thereinafter revoked by the trial court and a member of the Los Angeles County Public Defender's Office was appointed to represent the appellant and petitioner over his protests. (CT-7)[1]

On Appeal to the District Court of Appeal of the Second Appellate District of the State of California the judgment as entered after the jury had found the defendant and petitioner here guilty was affirmed, on June 26, 1973, Petition for rehearing denied July 16, 1973.

On a Petition for a Hearing to the California Supreme Court, the court summarily denied a hearing without a written opinion, on August 22, 1973.

The facts of the trial indicate that a 1963 Cehvrolet was taken from a residence in Longe Beach, California and was later found in the possession of the petitioner when he was stopped for routine traffic violations by police

1. CT has reference to the Clerk's transcript which was prepared for the appeal in the Second Appellate District of California on first appeal below.

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officers of Compton, California, who determined that the automobile had been hotwired and that the license plates had been changed.

The petitioner testified that he had purchased the automobile from a thrid party named "Jerry" and that he had later switches license plates on the automobile with another recently purchased Chevrolet automobile which was similiar to the model found in his possession.

The jury found the defendant and petitioner here guilty of grand theft of the automobile.

OPINIONS BELOW

The opinion of the California Supreme Court denying a hearing is unpublished and a true copy of the same is attached to this petition as appendix exhibit "A".

The decision of the District Court of Appeal of the Second Appellate District of the State of California is unpublished, and a copy of the decision and opinion is attached hereto and incorporated as a portion hereof as appendix exhibit "B". The decision of the Court of Appeal, a written opinion, affirmed the judgment and sentence as imposed by the Superior Court of the State of California for the County of Los Angeles.

JURISDICTION OF THIS COURT

Jurisdiction of this court to grant a discretionary review in this instant matter is conferred upon this Court by the mandatory provisions of section 1257(3) of the United States Code as Annotated.

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QUESTIONS PRESENTED

I.

THE DECISION OF THE CALIFORNIA COURTS THAT A DEFENDANT DOES NOT HAVE THE ABSOLUTE RIGHT UNDER THE PROVISIONS OF THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION TO REPRESENT HIMSELF IN PROPRIA PERSONA OR TO APPEAR PRO SE IN A CRIMINAL LITIGATION IS CONTRARY TO THE SIXTH AMENDMENTS EXPRESSED PROTECTIONS AND THE REFUSAL OF THE CALIFORNIA COURTS TO ALLOW THE DEFENDANT TO APPEAR AND DEFEND IN PRO SE AFTER SUCH A REQUEST HAD BEEN MADE OFFENDS DUE PROCESS OF LAW.

II.

WILL DUE PROCESS OF LAW ALLOW THE STATE TO IMPERMISSIVELY PREVENT PRODUCTION OF FAVORABLE DEFENSE WITNESSES DURING A CRIMINAL PROSECUTION BY THE APPOINTMENT OF COUNSEL TO REPRESENT A DEFENDANT IN A CRIMINAL LITIGATION OVER HIS EXPRESS OBJECTION AND WHERE COUNSEL REFUSES TO BRING SAID WITNESS AS A DEFENSE WITNESS?

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REASONS FOR GRANTING THE WRIT

1. The decision of the Court below finding that the Petitioner had no constitutional right either federal or state to appear and defend in propria persona or pro se during the trial of the criminal matter appears to be at variance with the dictum of this Court as expressed in Adams v. United States, 317 U.S. 369 which appears to indicate that the right to appear pro se in a criminal litigation if a Sixth Amendment Right which would be made applicable to the States under the due process and equal protection clause of the fourteenth amendment of the United States Constitution. Regarding this question, the decision of People v. Sharp, 7 Cal. 3d 448 (1972) is the recognized authorityin the State of California with respect to the constitutional right to appear and defend in propria persona or pro se wherein it is expressly held that the right to counsel may not be demanded to be waived and further that a defendant in a criminal cause of action has neither the Federally or State of California Constitutional right to appear in propria persona or to defend in pro se. Sharp, supra, at p. 457.

There is considerable conflict regarding this question among the United States Courts that have determined it with the decision of the United States Court of Appeals for the Second and the Ninth Circuit recognizing and expressly holding that defendant's incriminal litgations have the absolute right to appear pro se. United States

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v. Plattner, (2nd. Cir. 1964) 330 F. 2d 271; Arnold v. United States, (9th Cir. 1969) 414 F. 2d 1056. Several other United States Circuit Courts appear to subscribe to the result and theory reached in this area by the Second Circuit's determination in Plattner, Id., supra. United States v. Sternman, (6th Cir. 1969) 415 F. 2d 1165, 1169-1170; Lowe v. United States, (7th Cir. 1969) 418 F. 2d 100, 103. However, by the same token, it is readily apparent that the Circuit Court of Appeals of the Tenth Circuit; Van Nattan v. United States, (10th Cir. 1966) 357 F. 2d 161, 163-164; Eighth Circuit; Butler v. United States, (8th Cir. 1963) 317 F. 2d 249, 258; The District of Columbia Circuit; Brown v. United States, (D.C. Cir. 1959) 264 F. 2d 363, 365. At least one other State Supreme Court, Montana has held that a defendant does not have the constitutional right to represent himself; In re the Petition of Reece, ___P. 2d ___, _____Mont. _____, 1965, which is in agreeance with the Circuit Courts determinations of this question.

It is admittedly a question of first impression in this Court as this Court has never spoken directly to the Sixth Amendment's strictures in this regard. As this is an important question of first impression, as it has any number of constitutional realities, and where resolution is important to the proper administration of criminal justice to promote a uniform decision with respect to this question the writ should be granted.

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2. The failure of court-appointed counsel and likewise the trial court in allowing a witness who had been riding in the automobile with the petitioner at the time of the arrest, who had material testimony relative to the criminal matter to be brought forward at the trial, and the decision of the court below appears to be at a direct variance with the decisions of this Court that expressly hold that a defendant in a criminal litigation and trial is entitled to a fair trial; Powell v. Alabama, (1932) 287 U.S. 45; and is at variance with previous expressions of this Court providing dictum support for the fair trial theory of constitutional law in the area of witness production during the trial; Smith v. Illinois, (1968) 390 U.S. 129; Brookhart v. Janis, (1966) 384 U.S. 1 and further appears to be at variance with the Supreme Court of the State of Missouri; State v. Berkley, 92 Mo. 41 (48 .S.W. 24 quoting inter alia and relying upon the opinion of Chief Justice Marshal of the United States Supreme Court in 1 Burr's Trial 178, 179.

There was a recognizable conflict between the petitioner and counsel, and prior to the trial when the petitioner was appearing pro se and in propria persona he had requested issuance of process to have the witness brought to the trial and therein to appear as a defense witness. The resolution of this question by the Court below indicates disregard for the right to a fair trial, and presents a serious questions as to the impart of the constitutional

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right to a fair trial which is a necessary portion of the due process and equal protection clause of the fourteenth amendment making such a right applicable to the various states.

Such an important question turning as it does upon the right to a fair trial, and the production of witnesses being frustrated by the refusal of the trial court to allow the defendant; petitioner here; to represent himself in propria persona, and where there is a clear showing on the record that counsel as forced upon the petitioner failed to adhere to the request of the defendant that the Court be requested to make a diligent inquiry as to the whereabouts of this vital witness; would appear to require appropriate resolution by this court, to establish firmly delinated guidlines in this important area of the proper administration of criminal justice.

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ARGUMENT

I. THE STATES ARE CONSTITUTIONALLY REQUIRED TO ALLOW DEFENDANTS IN CRIMINAL LITIGATIONS AND TRIALS TO REPRESENT THEMSELF APPEARING IN PROPRIA PERSONA OR PRO SE UNDER THE TRADITIONAL CONCEPTS OF THE MANDATE OF THE SIXTH AMENDMENT AND THE DUE PROCESS AND EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

It is clear that the petitioner here at the time of the commencement of the criminal proceedings was intially allowed to represent himself in propria persona and to appear before the bar of the Court pro se. The superior court thereafter, albeit another judge of the court, revoked the propria persona status of the petitioner, and forced counsel upon the petitioner over his expressed objections. Such appointment of counsel, over expressed objection by a defendant in a criminal trial, and California decisional law; e.g. People v. Sharp, (1972) 7 Cal. 3d 457; which expressly holds that the right to appear in propria persona and appear before the court pro se is not a federal or state constitutional right, offends not only due process of law, but likewise flies into the very face of the pertiant provisions of the Sixth Amendment to the Constitution of the United States, which expressly provides the right to the assistance of 'counsel' but which does not "force counsel upon a defendant." Adams v. United States (1942) 317 U.S. 269, at p. 279.

The question of first impression is without a court in over two hundred years has

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never passed directly on this question, perhaps being that the issue has never squarely presented itself, as it is submitted is the present posture of this case; and where where it is readily apparent that there is considerable divergence in determination of this question by each of the Courts that have had occasion to pass upon such a claim, (See e.g. Self-Representation in Criminal Trials; The Dilemma of the Pro Se Defendant, 59 California Law Review 1479,) it is felt that; and it is so submitted; that this court should pass upon the merits of such a question and resolve the same for the proper adminsitration of criminal kustice in the United States.

The Courts of the State of California have fashioned various procedural devices, which ante dated the decision in Sharp, Id., supra, in an effort to curtail what the California Attorney General had termed as a mence to the Courts, the propria persona defendant. See e.g. People v. Floyd, 1 Cal. 3d 694 (1970); People v. Glasser, (1968) 265 Cal. App. 2d 849. Indeed, it is clear that the voters and the general public of the State of California only recently voted to amend the Constitution of the State of California; wherein Article One section 13 of the California State Constitution was amended to take effect on June 6, 1972 to state as a necessary portion thereof that the "Legislature shall have the power to require the defendant in a felony case to have the assistance of counsel." see e.g. section 13, Article One California State Constitution

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as amended June 6, 1972, compare also the provisions of California Penal Code sections 686, 859 and 987 and a new enactment section 686.1 which provide that in special cases in the State of California an accused defendant must be represented by counsel at all stages of the preliminary and pretrial as well as trial portions of the criminal litigation.

Conversly thus it appears then, that the question which is before this Court turns on two important considerations namely will the decisional law in California as indicates that the right to appear in propria persona and litigate before the bar in a criminal litigation pro se is not a federally consitutionally protected right, and likewise will the provisions of a State Constitution which expressly forbids self-representation and appearance in propria persona or pro se of a defendant in a criminal litigation, survive the test of the apparently federally mandated constitutional provisions of the sixth amendment which appears to expressly provide that a defendant may appear without counsel in propria persona or pro se in a criminal litigation and trial. On the rationale approach to constitutional sanction it is submitted that neither rationale as reached in California will withstand the intent of the frmers of the constitution when they, as a necessary portion of a fair trial and in inherently framing the command of the sixth amendment made very clear that such a right is so fundamental that no court should be called

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upon to determine the extent of the right. On this basis it is submitted that the right to appear and defend in person is such an important right that any curtailment of that right is fundamentally lacking in concern for the proper objective tests of due process of law; Carter v. Illinois, (1946) 329 U.S. 173; and equally if allowed to stand would sanction clear eroding of constitutional principals which cannot be allowed as a matter of law. Compare Carter v. Illinois, supra with the result reached by the United States Court of Appeal for the Second Circuit in United States v. Plattner, (2nd Cir. 1964) 330 F. 2d 271.[2/]

Here as in Carter v. Illinois, Id. supra, there is no showing that the petitioner ever waived his right to appear in propria persona and further the record expressly indicates that the petitioner at no time ever waived his right to appear by his own person; and indeed the record is very clear in this regard that petitioner objected to the Superior Court forcing counsel upon him. In this regard the Court below indicates at pages 3-4 of their opinion that:

> "The court initially granted Faretta's motion to represent himself. During the pretrial proceedings, however, the court concluded that Faretta had not intelligently waived his right to be represented by counsel, and appointed counsel to represent him at the trial. Faretta"

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"contends the court erred.

We find no error. Faretta had no constitutional right to represent himself. (People v. Sharp, 7 Cal. 3d 448, 458-460.) And we cannot say that the trial court abused its discretion in concluding that Faretta had not made a knowing and intelligent waiver of his right to be represented by counsel. (People v. Floyd, 1 Cal. 3d 694, 702-705.) Despite his desire to be his own attorney, Faretta did not appear to be aware of the possible consequences of waiving the opportunity for skilled and experieinced representation at trial." (Opinion cited supra, EMPHASIS ADDED)

Thus it is clear that the subjective test applied in resolution of this issue in the Court below, turned upon a limitation of "ones right" to conduct "one's own defense in propria persona," United States v. Plattner, supra at p. 274, and further that the California Courts have read into the right to counsel which attached to all state court proceedings with this Court's determination of Gideon v. Waigmwright, (1963) 372 U.S. 335 a requirement that counsel be appointed notwithstanding any desires of the defendant to appear in propria persona. In other words, California is in effect stating that Counsel must be given

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2. The Plattner, case supra, appears to have been distinguished somewhat in United States v. Abbamonte, (2nd Cir. 1965) 348 F. 2d 700; however it is submitted that it did not overrule Plattner in any sense of the means.

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to all criminal defendants, and that the criminal defendants must accept counsel, whether they desire counsel or not. Indeed, the California Supreme Court in Sharp, supra focused on this particular aspect of California decisional law when they likened the right to appear and defend in person, although admittedly a constitutional right, to be a conditional constitutional right which could only be waived upon the consent of the trial court. See Sharp, supra, at p. 455 where counsel waiver is likened to Jury waiver as determined by this Court in Singer v. United States, (1965) 380 U.S. 24. Such a holding flies into the face of the very holdings of this court which indicate that at that sixth amendment does guarantee "assistance of counsel" however it does not "force a lawyer upon a defendant," Adams, Id., supra at p. 279, and ignores totally the very plain fact that counsel was not provided to all criminal defendants as a matter of right in the United States for over two hundred and fifty years prior to the advent of Gideon, Id., supra.

To allow the holding of this Court in Gideon, Id. supra, to dilute the right to appear and defend in person it is submitted does violence and in some sort of sense perverts the entire impart of the very clearly expressed intent of the Sixth Amendment, and upon this basis it is clear that while counsel is sometimes admittedly a clear need, on the facts of this cause, revocation of the propria persona status and refusing to allow the petitioner

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to defend in his own proper person encrouched upon the substantial rights of this petitioner, and no matter how the court's below attempt to justify the same, as a matter of clear constitutional sanction this petitioner has been sperived of the full measure of what the framers of the constitution intended was to be his to hold when the Sixth amendment was made a portion of the Bill of Rights to the C onstitution of the United States.

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II. THE CURTAILMENT OF WITNESS PRODUCTION OCCASIONED BY THE TRIAL COURTS' REFUSAL TO ALLOW THE PETITIONER TO REPRESENT HIMSELF, VIOLATED DUE PROCESS OF LAW IN THAT COUNSEL WOULD NOT IN CONJUNCTION WITH THE TRIAL COURT PRODUCE THE WITNESS HENCE PETITIONER WAS DEPRIVED OF THE FAIR TRIAL THAT DUE PROCESS OF LAW CONTEMPLATES.

The Court below indicated in their decision that the claim of the Petitioner that he was denied the production of certain defense witnesses was "spurious." Likewise the court indicated that the counsel as assigned to the defendant did not call as a witness the one "Charles Cunningham" who the petitioner desired as a witness as he was in the automobile at the time of the petitioners' arrest on traffic violations. (Slip opinion of Court of Appeal, op. cit., supra, at page 6)

The court then went onto to provide the support for the consideration of this claim, which is presented in this Court, quoting from the testimony of the Defendant as given during the trial in defense. (Op. cit., supra, at pp. 7) The relevant portion of that testimony was indicated as follows:

"Q. Have you made any efforts to find him?

A. Previous to a competency hearing and my subsequent termination, you know, of defendant's representative for defendants, I had subpoenaed Charles Cunningham to the County for an interview, and I called his mother several times." (EMPHASIS ADDED)

The competency hearing referenced, supra, was the

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trial court's determination that the defendant had not made an intelligent waiver of counsel, and where the propris persona status of the petitioner was terminated prior the the trial. It was at this stage of the proceedings that counsel was appointed to represent the petitioner in the California Superior Court.

The testimony there is very revealing in two respects as deals with the question which is presently before the court here for determination. First it indicated that when defendant was acting as his own attorney, that he had already issued a subpoena for the attendance of the witness and the testimony further reveals that he had asked counsel as appointed by the Court "I ask (defense counsel) to endeavor to contact him" so that the witness would be available as a witness. The record further reveals that such request was neither honored and further that the trial court apparent quashed the issued subpeona of the petitioner, which subpeona had been issued when the petitioner was counsel of record in this matter.

It appears that the fundamental rights that are concerned here, is first the right to a fair trial and secondly the opportunity to present witnesses in one's defense. Both areas are constitutionally advanced and proper contentions when the aspects of due process are taken into consideration here. Indeed, the action of the trial court in appointing counsel, as discussed above appeared to be error per se, and further the quashingof process for the

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appearance of the defendant's witness, who had been under subpeona when petitioner had been appearing in propria persona coupled with the refusal of counsel to reserve the witness, assuredly deprived the petitioner of the fair trial that constitutional sanction contemplates. For a court to be allowed to exclude evidence of an essential element of the defense or to preclude the calling of a material witness, constitutes a denial of due process of law, and indeed there is California authority that so holds. (Compare: e.g. In re Harris, 56 Cal. 2d 879 with People v. Wilson, 179 Cal. App. 2d 821, where due process sanctions appear to be discussed in context with the procedure which was employed in this cause of action.)

Indeed, it has been held that it is error for a court to require a defendant to submit his case to the jury without the presence of his witnesses and the benefit of their oral testimony and further it is apparent that the right of an "accused person to the process of the court to compel the attendance of witnesses seems to following, necessarily, from the right to examine those witnesses; and whereever the right exists, it would be reasonable that it should be accompanied by means of rendering if effectual." (See e.g. State v. Berkley, 92 Mo. 41; (48 S.W. 24) quoting inter alia, Chief Justice Marshal from 1 Burr's Trials 178, at p. 179.

The constitutional right to securement of defense witnesses is a constitutional right of the first strata

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and "no want of prejudice would cure it." Smith v. Illinois, (1968) 390 U.S. 129, 131, quoting inter alia from Brookhart v. Janis, (1966) 384 U.S. 1, 3.

The implications here are readily apparent and fully delinated above, because had the petitioner been counsel and appearing in propria persona, then this question would never have presented itself, as the witness would have been available and would have been utilized.

The important remification of constitutional application of procedural due process of law given in context controls the determination of this question, and as this is a very important question concerning the proper application and administration of criminal justice it is requested that this court make an appropriate determination of this question and resolve it firmly establishing guidelines for further and future utilization by the Courts to eliminate the inherent prejudice in such situations as presented upon the particular factual situation of this case.

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CONCLUSION

Premised upon the clearly presented and pertiant constitutional questions of this petition it is respectfully submitted that this is a proper case for the exercise of this Court's discretion in granting appropriate review, and making firmly delinated resolutions of the questions that have been presented.

DATED: October 15, 1973, at the Central Training Facility, Soledad, California, 93960.

Respectfully submitted,

Anthony P. Faretta

ANTHONY PASQUALL FARETTA,

Petitioner appearing Pro Se

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APPENDIX TO PETITION

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46843-790 8-70 300M 1T O&P

UNAVAILABLE

APPENDIX EXHIBIT "A"

STATE OF CALIFORNIA }
COUNTY OF MONTEREY } ss.:

I, the undersigned do hereinafter declare under the penalities of perjury, that the exhibit hereinafter is a true copy of the order received by this undersigned from the Clerk of the Supreme Court of the State of California with regard to a petition for a hearing as taken from a decision as entered by the District Court of Appeal of the Second Appellate District of California. Executed on this 15th DAY OF OCTOBER, 1973, at the CALIFORNIA DEPARTMENT OF CORRECTIONS FACILITY, CENTRAL TRAINING FACILITY, SOLEDAD, COUNTY OF MONTEREY, STATE OF CALIFORNIA, 93960.

Anthony P. Faretta

ANTHONY PASQUALI FARETTA, Declarant

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46842-750 8-70 200M 17 OBP

APPENDIX EXHIBIT "B"

STATE OF CALIFORNIA)
) ss.:
COUNTY OF MONTEREY)

I, the undersigned do hereinafter declare under the penalities of perjury, that the hereinafter styled exhibit is an exact true copy of the decision as sent to me by the Clerk of the District Court of Appeal of the Second Appellate District of the State of California, when a decision was entered in first appeal; and further that the same reflects the action of the court. EXECUTED ON THIS 15th DAY OF OCTOBER, 1973, AT THE CALIFORNIA DEPARTMENT OF CO* RRECTIONS CENTRAL TRAINING FACILITY, SOLEDAD, COUNTY OF MONTEREY, STATE OF CALIFORNIA, 93960.

Anthony P. Paretta

ANTHONY PASQUALE PARETTA, Declarant

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The original of this copy was of photographically poor quality.

NOT FOR PUBLICATION.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,
v.
ANTHONY PASQUALL PARETTA,
Defendant and Appellant.

2D CRIM. NO. 2272
(Sup.Ct.No. A 012 665)

Filed
June 26, 1973
JH

APPEAL from judgment of the Superior Court of Los Angeles County. Carroll M. Dur .a, Judge. Affirmed.

Norman W. De Carteret, Esq., under appointment by the Court of Appeal, for Appellant.

Evelle J. Younger, Attorney General, Edward A. Hinz, Jr., Chief Assistant Attorney General -- Criminal Division, William E. James, Assistant Attorney General -- Appeals Section, Howard J. Schwab and Donald J. Caser, Deputy Attorneys General, for Respondent.

[illegible] appeals the judgment [illegible] rendered upon the jury's verdict finding him guilty of grand theft. (Pen. Code, § 487, subd. 3.)

FACTS

Dean Telford's 1963 Chevrolet Nova was stolen from the street in front of his home in Long Beach between 7:00 p.m. on 21 May 1972 and 6:00 a.m. on 22 May 1972. At 6:00 a.m. on 22 May 1972 Compton Police Officer Edwards stopped defendant Faretta for a traffic violation. Faretta was driving Telford's Nova. The Nova was "hotwired" and the license plates had been changed. Faretta told Edwards he purchased the Nova from "Bubby" two or three days before. Faretta showed Edwards keys he said belonged to the car, but the keys did not work the Nova's locks.

After his arrest, Faretta telephoned the managers of the hotel where he lived and asked them to remove a tapedeck and pink slip (certificate of automobile ownership) from his room and to place the pink slip to show that Faretta owned the car. The tapedeck and pink slip were in the Nova when it was stolen. The managers gave the tapedeck and pink slip to the police. An investigating officer found another 1963 Chevrolet Nova without license plates parked a block from Faretta's hotel.

Faretta testified on the defense that he bought

Telford's Nova from "Jerry" on the evening of 21 May 1972 and switched license plates from another Nova he owned to the newly-purchased one. While in jail awaiting trial, Faretta attempted to pass a note to another prisoner: "Jerry . . . I've been down since May 21, on a GTA. I told them when I got busted I bought the car from a guy named Jerry. . . . If you sold me the car on the 20th of May, 1972 about 10:00 p.m. please confide in my attorney and we'll try to get around in the court. . . ."

ISSUES

Faretta contends (1) the court should have permitted him to represent himself; (2) there was no probable cause for his arrest; (3) the pink slip was illegally seized by an agent of the police; (4) he was denied his right to produce witnesses; (5) the prosecutor's question concerning a prior consistent statement was prejudicial misconduct; and (6) the court should have instructed the jury concerning the limited use of evidence of prior offenses.

DISCUSSION

1. Representation.

The court initially granted Faretta's motion to represent himself. During pretrial proceedings, however, the court concluded that Faretta had not intelligently waived his right to be represented by counsel, and appointed

counsel to represent him at trial. Faretta contends the court erred.

We find no error. Faretta had no constitutional right to represent himself. (People v. Sharp, 7 Cal.3d 448, 459-460.) And we cannot say that the trial court abused its discretion in concluding that Faretta had not made a knowing and intelligent waiver of his right to be represented by counsel. (People v. Floyd, 1 Cal.3d 694, 702-705.) Despite his desire to be his own attorney, Faretta did not appear aware of the possible consequences of waiving the opportunity for skilled and experienced representation at trial.

Smith v. Superior Court, 68 Cal.2d 547, relied on by Faretta, is not in point. Smith involved the right of the trial court to replace a court-appointed attorney based on the court's subjective belief that the attorney was not competent to handle the case. The defendant's understanding of the consequences of retaining the attorney was not in issue.

2. The Arrest.

Faretta contends there was no probable cause for his arrest and therefore that the car he was driving was illegally seized.

We need not consider this contention because Faretta did not object on this ground at trial. (People

v. Flores, 63 Cal.2d 563, 567.) Moreover, Faretta improperly relies on statements in an arrest report not part of the record on appeal. (People v. Gordon, 71 Cal.2d 843, 849.) In any event, Officer Edwards testified that when he stopped Faretta for a traffic violation, Faretta stated he did not have a driver's license and did not know where the registration for the Nova was. Edwards saw that the Nova had been hotwired. Faretta gave Edwards an automobile registration slip that listed the license plates on the Nova but a different vehicle registration number. Edwards ran a check on the vehicle registration number of the Nova, and learned that the Nova should have had a different set of license plates. These facts amply justified Faretta's arrest for theft of the Nova.

3. The Pink Slip.

Faretta contends the police obtained the pink slip by an illegal search and seizure. He argues that the hotel manager who found the pink slip in Faretta's hotel room and gave it to the police was acting as an agent of the police.

Faretta testified that he asked the hotel managers to find the pink slip and give it to the police. The hotel managers testified that Faretta asked them to find the pink slip and alter it. The investigating police officer testified that one of the hotel managers told him she was going to look for the pink slip and asked if the

officer wanted to be present; he waited outside Faretta's hotel room door until the manager located the pink slip.

The contention is without merit. If Faretta asked the managers to find the pink slip and give it to the police, then he consented to the search. If Faretta asked the managers to find the slip and alter it, he may not complain if the managers violated his confidence and gave the slip to the police. (See Hoffa v. United States, 385 U.S. 293, 300-303.) And if the investigating officer merely stood by while the hotel manager carried out her own search, we cannot say that the police were so involved in the planning and execution of the search as to render the hotel manager an agent of the police. (See Raymond v. Superior Court, 19 Cal.App.3d 321, 325-326.)

4. Right to Produce Witnesses.

Faretta contends he was denied the right to produce witnesses because his counsel did not call as a witness Charles Cunningham, the passenger with Faretta in the Nova when he was arrested.

The contention is spurious. Faretta did not present this claim at trial. He made no showing that Cunningham would have given relevant testimony. (See People v. Vatelli, 15 Cal.App.3d 54, 58-59.) And Faretta's own testimony proves that Cunningham could not be located:

"Q You have maintained contact with that gentleman since you have been incarcerated; isn't that

[illegible] Charles Cunningham? Q Yes. A No. His mother is very interested in knowing where he is at. I have maintained contact with her. Q You don't know where Charles is? A I don't. Q Have you made any efforts to find him? A Previous to a competency hearing and my subsequent termination, you know, of defendant's representative for defendants, I had subpoenaed Charles Cunningham to the County for an interview, and I called his mother several times. I have tried to contact him, and I asked [defense counsel] to endeavor to contact him, and all this has proved fruitless.'

3. Prosecutorial Misconduct.

Faretta testified that after his arrest he called the hotel managers and told them to find the pink slip and give it to the police. On cross-examination the prosecutor asked Faretta why he did not tell that to the district attorney before trial. The court sustained an objection to that question, denied a motion for mistrial, and admonished the jury to disregard the question.

The prosecutor erred in questioning Faretta about his failure to make exculpatory statements before trial. (People v. Rogers, 220 Cal.App.2d 143, 146.) However, in light of the overwhelming evidence of guilt, the court's specific prompt admonition to the jury to disregard the question, and the court's general instruction to the jury that questions are not evidence, we are

convinced beyond a reasonable doubt that the error was harmless. (People v. Crawford, 253 Cal.App.2d 524, 536; Chapman v. California, 386 U.S. 18, 24.)

5. Limited Use of Prior Offenses.

The information alleged that Faretta had four prior felony convictions. Faretta denied the allegations. The prosecution presented evidence to prove the prior convictions, and the jury found the allegations to be true. Faretta contends the court should have limited the extent of the prosecution's evidence to prove the prior convictions and should have instructed the jury that the evidence could not be considered proof of Faretta's criminal propensities.

This contention, too, is without merit. Because Faretta did not object to admission of evidence to prove the prior convictions, we need not consider the contention on appeal. (People v. Johnson, 5 Cal.App.3d 851, 863.) Moreover, the prosecution is not limited to any particular type of evidence to prove prior convictions. (People v. Hill, 67 Cal.2d 105, 127.) In any event, the limited use of evidence of prior convictions was adequately explained to the jury in this instruction:

". . .

"In this case, you must first decide the question of whether defendant is guilty of the offense charged and your consideration of that question must not be

influenced by the allegation of the alleged prior conviction[s].

"If you find the defendant not guilty as to the offense charged, it will not be necessary to determine whether the allegation[s] of the prior conviction[s] [are] true. . . ."

The judgment is affirmed.

NOT FOR PUBLICATION.

FLEMING, J.

We concur:

ROTH, P.J.

COMPTON, J.